109-194

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 92.

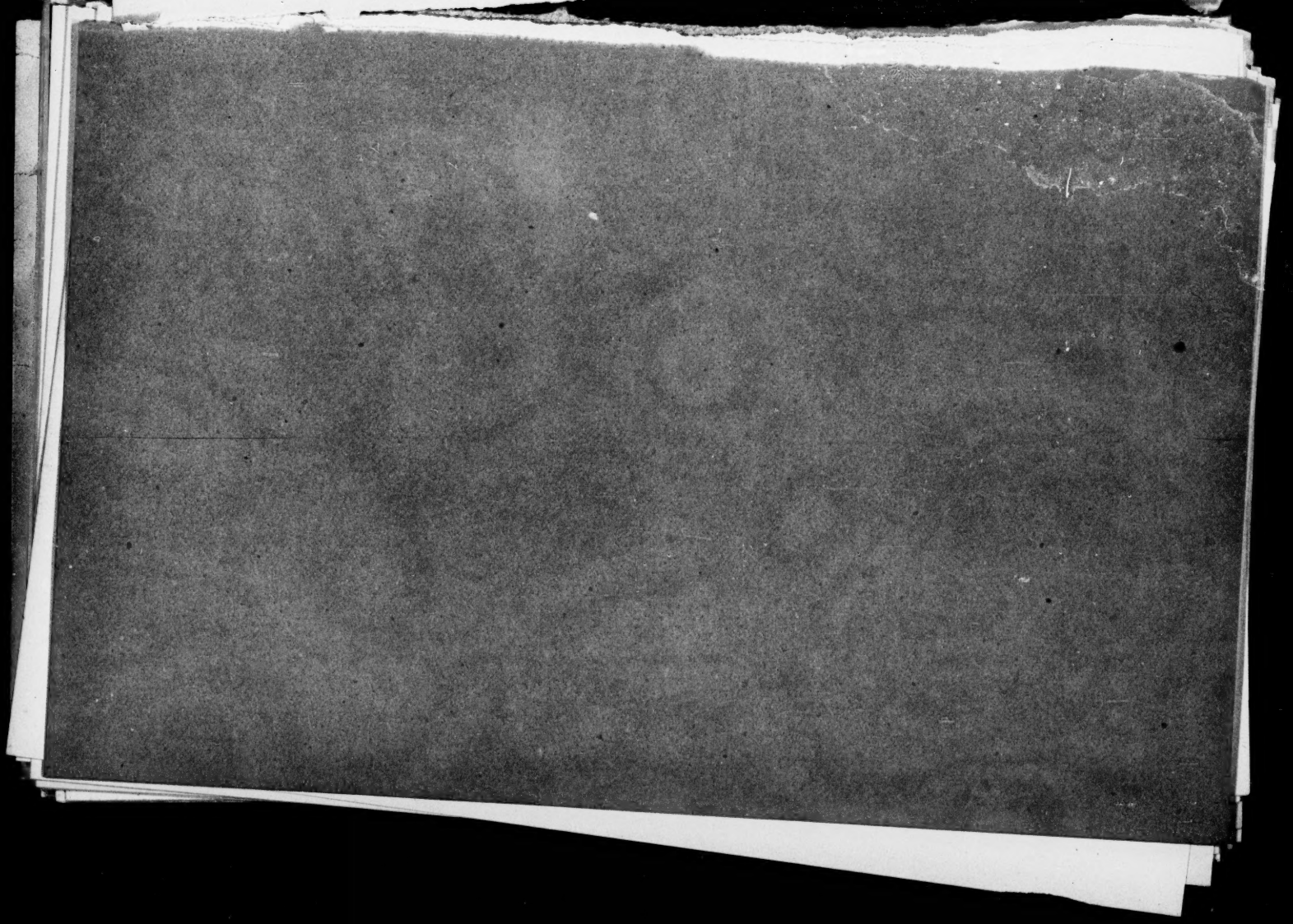
GEORGE D. CRAGIN, PLAINTIFF IN ERROR,

vs.

WILLIAM S. LOVELL, EXECUTOR OF ELIZA A. QUITMAN, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED OCTOBER 11, 1880.



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a UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

GEORGE D. CRAGIN, PLAINTIFF IN ERROR,
vs.
ELIZA A. QUITMAN, DEFENDANT IN ERROR. } No. 8691.

Rouse & Grant, esq'r's, for plaintiff in error, Hornor & Benedict, esq'r's, for defendant in error.

TRANSCRIPT OF RECORD.

Returnable to the Supreme Court of the United States the second Monday of October, 1880.

1 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

ELIZA A. QUITMAN
vs.
GEORGE D. CRAGIN. } No. 8691.

Petition.—Filed March 3d, 1880.

To the honorable judges of the circuit court of the United States for the district of Louisiana:

The petition of Eliza A. Quitman, unmarried, of age, a resident of Ulster County, State of New York, and a citizen of said State, with respect represents:

That George D. Cragin, a citizen of the State of Louisiana, residing in the parish of Terre Bonne in said State, is justly and truly indebted unto your petitioner in the full sum of twelve thousand dollars with interest and costs, subject to the following credit for this, to wit:

2 That on the 31st of January, 1870, by act before Andrew Hero, jr., notary, your petitioner sold a certain plantation known as the *the* Live Oak, or Quitman place, in the parish of Terre Bonne, to one Orlando P. Fisk, for the price and sum of $22,500, of which $4,500 was paid in cash, and for the balance nine notes of said O. P. Fisk were given, each dated 31st January, 1870, each for the sum of $2,000, and payable respectively at one, two, three, four, five, six, seven, eight, and nine years after date *respectively*, bearing interest at the rate of seven per cent. per annum until maturity and thereafter at the rate of eight per cent. per annum until final payment, which said act of sale and mortgage was duly recorded on the 12th day of February, 1870, in the proper office of the parish of Terre Bonne.

Your petitioner further represents that thereafter the notes maturing at one, two, and three years were duly paid by said George D. Cragin.

Petitioner now represents that after said payments, no further payments were made by said Cragin, and your petitioner was compelled to foreclose

her mortgage against the said property and to buy in the same, which was done after due and legal proceedings, and the same realized the
3 sum of $10,447.05 to be credited upon said notes under date the 1st day of May, 1874, which will more fully and at large appear by reference to the sheriff's deed of sale hereunto annexed and made part of this petition.

Now your petitioner represents that George D. Cragin is and was the real owner of said property and liable to your petitioner for the following reasons, viz:

That subsequent to the said purchase of property by said Orlando P. Fisk, by a certain proceeding filed in this honorable court under the No. 6622 of the docket, the said George D. Cragin did claim the entire ownership of the said property, and did claim that the purchase made in the name of the said Orlando P. Fisk was illegally entered in his own name by said O. P. Fisk, who was acting merely as the agent of said George D. Cragin, and that the amount of the purchase price of said property paid in cash, as well as the first and second note aforesaid, were made by said Orlando P. Fisk with the money of said George D. Cragin, and
4 that he, said Cragin, was liable for and ready to pay for said property; that thereafter, in due course of law, and after proper proceedings, the said George D. Cragin was adjudged by this honorable court, by final decree, to be the owner of said property, and the matters and things in said petition contained were found to be true and correct.

That pending said proceedings the said George D. Cragin was and in said case appointed the receiver of the said Live Oak or Quitman plantation, so sold by your petitioner as aforesaid, and that acting as such receiver, and subsequently as such owner of said plantation, he did remove therefrom all the movable property thereon, and which existed thereon at the date of the sale by your petitioner to said O. P. Fisk, of a value exceeding $1,000, and did lay waste and dilapidate the said property to benefit his adjoining plantation, and to the detriment of your petitioner's rights.

Petitioner further avers, that by reason of the causes aforesaid the said George D. Cragin is liable and indebted unto your petitioner in
5 the full amount of said notes, less the credit due as aforesaid, for which amicable demand has been made without avail.

Petitioner further represents that her sister and covendor, Louisa S. Quitman, having departed this life, your petitioner was, under her last will and testament, duly recognized and sent into possession of her estate as her sole and only heir and legatee, and became thereby the sole owner of the notes and rights of action herein declared upon.

Wherefore your petitioner prays that said George D. Cragin be duly cited to appear and answer this petition, and after due proceedings had, that your petitioner do have and recover against George D. Cragin in said sum of twelve thousand dollars, with seven per cent. per annum interest thereon from the 31st day of January, 1870, to their respective maturities of said notes, and at 8 % per annum thereafter until paid, subject to a credit of $10,447.05, of date the 6th of May, 1874, and she prays for costs and for all general and equitable relief.

(Signed) HORNOR & BENEDICT, *Atty's.*

6 *Citation.—Issued March 3d, 1879.*

Circuit court of the United States, fifth circuit, district of Louisiana.

ELIZA A. QUITMAN
vs.
GEORGE D. CRAGIN. } No. 8691.

To GEORGE D. CRAGIN:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or to deliver your answer to the same in the office of the clerk of the circuit court of the United States, fifth circuit and district of Louisiana, in the city of New Orleans, in ten days after the service hereof, which delay is increased one day for every ten miles your place of residence is distant from New Orleans, the place where the court is held.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 3d day of March, A. D. 1879, and of the Independence of the
7 United States of America the 103d year.

[SEAL.] (Signed) F. B. VINOT, *D'y Cl'k.*

Marshal's return.

Received March 3d, 1879, by the U. S. marshal and on the 3d day of April, 1879, served a copy of the within citation with petition accompanying the same, on the within-named George D. Cragin, defendant, by handing the same to him in person in the town of Houma, parish of Terre Bonne, La., 70 miles from New Orleans.

New Orleans, April 12th, 1879.

(Signed) C. R. STEELE, *D'y Marshal.*

Default.—Extract from minutes.

NEW ORLEANS, *Wednesday, April 23d,* 1879.

Court met pursuant to adjournment.

Present, Hon. E. C. Billings, district judge.

ELIZA A. QUITMAN
vs.
GEORGE D. CRAGIN. } No. 8691.

On motion of Hornor & Benedict, attorneys for plaintiff, and on
8 showing to the court that the defendant has failed to answer although duly cited:

Ordered, that judgment by default be entered against him.

Verdict.—Extract from minutes of April 26th, 1879.

ELIZA A. QUITMAN
vs.
GEORGE D. CRAGIN. } No. 8691.

This cause came on for the confirmation of the default herein entered on

the 23d April, 1879. Hornor & Benedict appearing for plaintiff, when the following jurors were called and sworn in the premises:

1. E. L. Howell.
2. Tom Taylor.
3. James Doran.
4. J. Devonshire, sr.
5. W. C. Cook.
6. Chas. Rhodes.
7. C. W. Mittenberger.
8. Chas. Guerrineau.
9. W. T. Richards.
10. Paul Morgan.
11. Ernest Joubert.
12. George Dean.

And the jury being complete the court appointed W. T. Richards foreman thereof, and the trial proceeded. And after hearing the
9 pleadings and the evidence the cause was submitted to the jury, who then and there in open court through their said foreman rendered and delivered the following verdict, to wit:

Verdict for pl'ff and against the defendant for twelve thousand dollars with interest, as prayed for in petition.

April 26, 1879.

W. T. RICHARDS, *Foreman.*

Whereupon it was ordered that the said verdict be recorded, and it is done accordingly.

Judgment.—Extract from judgment-book, November term, 1878.

NEW ORLEANS, *Saturday, April* 26, 1879.

Court met pursuant to adjournment.

Present, Hon. Edward C. Billings, district judge.

ELIZA A. QUITMAN
vs.
GEORGE D. CRAGIN. } No. 8691.

By reason of the verdict of the jury herein and in accordance therewith, it is ordered, adjudged, and decreed that the plaintiff, Eliza A.
10 Quitman, unmarried, and of age, do have and recover of the defendant the sum of twelve thousand dollars with seven per cent. per annum interest on $2,000 from 31st January, 1870, to 3d February, 1873; on $2,000 from 31st January, 1870, to 3d February, 1875; on $2,000 from 31st January, 1870, to 3d February, 1875; on $2,000 from 31st January, 1870, to 3d February, 1876; on $2,000 from 31 January, 1870, to 3d February, 1877; on $2,000 from 31st January, 1870, to 3d February, 1878; and on $2,000 from 31st January, 1870, to 3d February, 1879, and interest at the rate of 8 % per annum on said respective sums of $2,000 from said respective dates of the maturities of said notes, to wit, from 3d day of February, 1873, 1875, 1876, 1877, 1878, and 1879, till paid, and costs of suit, subject to a credit of $10,447.05 paid on 6th May, 1874.

Judgment rendered April 26, 1879.

Judgment signed April 26, 1879.

(Signed) EDWARD C. BILLINGS, *Judge.*

Motion and order for writ of error.—Extract from minutes April 12th, 1880.

ELIZA A. QUITMAN
versus } No. 8691.
11 GEORGE D. CRAGIN.

On motion of Rouse & Grant, attorneys for George D. Cragin, the defendant in this case, suggesting that he believes there is error in the final judgment herein rendered against him on the 26th day of April, 1879, it is ordered that he be allowed a writ of error in said cause returnable to the Supreme Court of the United States on the first day of the next October term thereof upon said defendant executing and delivering a bond with solvent surety for the payment of the costs in the sum of two hundred and fifty dollars, conditioned as the law directs.

Bond for writ error.—Filed April 12th, 1880.

Know all men by these presents that we, George D. Cragin, as principal, and Samuel Cragin, as surety, are held and firmly bound unto Eliza A. Quitman in the full and just sum of two hundred and fifty dollars, to be paid to the said Eliza A. Quitman, her certain attorney, executors,
12 administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of April, in the year of our Lord one thousand eight hundred and eighty.

Whereas lately a circuit court of the United States, fifth judicial , holding sessions in and for the district of Louisiana, to wit, on the 26th day of April, 1879, in a suit depending in said circuit court, wherein said Eliza A. Quitman, plaintiff, and said George D. Cragin, defendant, judgment was rendered against the said George D. Cragin, defendant, and the said George D. Cragin, defendant, having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Eliza A. Quitman, citing and admonishing her to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

13 Now the condition of the above obligation is such that if the said George D. Cragin shall prosecute his writ to effect and answer all costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) G. D. CRAGIN. [L. S.]
(Do.) SAM'L CRAGIN. [L. S.]

Approved:
(Signed) EDWARD C. BILLINGS, *Judge.*

14 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States

for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 14 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the case of Eliza A. Quitman vs. George D. Cragin, No. 8691 of the docket said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 21st day of July, A. D. 1880.

(Nineteen words erased—null.)

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, Edward C. Billings, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 21st day of July, A. D. 1880.

EDWARD C. BILLINGS, *Judge.*

15 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you or some of you, between Eliza A. Quitman and George D. Cragin, a manifest error hath happened to the great damage of the said George D. Cragin, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of he United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 19th day of April, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court
for the District of Louisiana.

(Indorsed:) United States circuit court. No. 8691. George D. Cragin, plaintiff in error, versus Eliza A. Quitman, defendant in error. Writ of error. Filed April 19th, 1880. T. V. Coupland, d'y clerk.

16 THE UNITED STATES OF AMERICA:

Circuit court of the United States, district of Louisiana.

The President of the United States to Eliza A. Quitman, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein George D. Cragin is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said George D. Cragin, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 19th day of April, in the year of our Lord one thousand eight hundred and eighty.

EDWARD C. BILLINGS, *Judge.*

17 (Indorsed:) United States circuit court. No. 8691. George D. Cragin, *is* plaintiff in error, vs. Eliza A. Quitman, defendant in error. Citation.

Marshal's return.

Received Apr. 20, 1880, by the U. S. marshal, and on same day, month, and year I served a true copy of the within writ of error on Eliza A. Quitman, defendant in error herein, by delivering the same to Joseph P. Hornor, esq., the attorney for the aforesaid Eliza A. Quitman, in person, in the city of New Orleans, district of Louisiana, the said Eliza A. Quitman being a non-resident of the district of Louisiana.

E. S. CURRY,
D'y U. S. Marshal, District of Louisiana.

On the 23d day of April, 1880, personally appeared before me E. S. Curry, a deputy United States marshal in and for the district of Louisiana, and makes oath that he served a true copy of the within writ of error on Eliza A. Quitman, defendant in error herein, as set forth in his official return hereon.

E. S. CURRY,
D'y U. S. Marshal, District of Louisiana.

Subscribed and sworn before me 23d April, 1880.

T. V. COUPLAND,
Commissioner United States Circuit Court, District of Louisiana.

(Indorsement on cover:) No. 92. George D. Cragin, plaintiff in error, vs. William S. Lovell, executor of Eliza A. Quitman, deceased. Louisiana C. C. U. S. Filed October 11, 1880.

109-92

OFFICE SUPREME COURT U. S.
FILED
OCT 20 1883
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 92.

GEORGE D. CRAGIN, PLAINTIFF IN ERROR,

versus

WILLIAM S. LOVELL, EXECUTOR OF ELIZA D. QUITMAN, DECEASED.

J. D. ROUSE,
WM. GRANT,
Attorneys for Plaintiff in Error.

F. F. Hansell, Stationer and Printer, 30 Camp Street, New Orleans.

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 92.

GEORGE D. CRAGIN, PLAINTIFF IN ERROR,

versus

WILLIAM S. LOVELL, EXECUTOR OF ELIZA D. QUITMAN, DECEASED.

STATEMENT.

The petition in this case, upon which judgment was rendered, contains two counts. The first count in substance charges that the petitioner, by act before A. Hero, a notary, sold to Orlando P. Fisk, on the 31st of January, 1870, the Live Oak Plantation, for $22,500; that Fisk paid $4500 in cash, and executed his nine notes for $2000 each, payable respectively in nine equal annual installments; that George D. Cragin afterwards paid the first three notes as they matured; that petitioner was then compelled to foreclose his mortgage by suit against Fisk, and that she bought in the property for $10,447, which was credited on the notes; that Cragin was the real owner of the property, and

liable to petitioner for the following reasons, viz.: That subsequent to said sale to Fisk, the said Cragin, in a certain proceeding in the United States Circuit Court, claimed the entire ownership of the property, and claimed that the purchase made by Fisk was illegally entered in his own name by said Fisk, who was acting as the agent of said Cragin; that the cash payment, as well as the payment of the first and second notes, were made by said Fisk with the money of Cragin; that the said Cragin was adjudged to be the true owner of said property, and that the matters and things in said petition were adjudged to be true. The second count charges that, pending said proceedings, the said Cragin was appointed receiver of said plantation, and that as such receiver, and subsequently as owner, he removed therefrom all the movables which existed on the plantation at the date of the sale to Fisk, of a value exceeding $10,000, and laid waste and dilapidated the plantation to the detriment of petitioner's rights; that by reason of said causes Cragin became indebted to petitioner in the full amount of said notes; that her sister, Louisa S. Quitman, co-vendor, having departed this life, petitioner was put in possession of her estate, and thereby became owner of the notes and the right of action. Record, page 1.

The defendant, though cited, did not appear, and judgment was entered against him by default, for

the whole amount claimed in the petition. Record, page 3.

ASSIGNMENT OF ERRORS.

1st. The petition upon which judgment by default was rendered does not set forth a legal cause of action against the plaintiff in error.

2d. The beneficiary in a resulting trust does not ratify the conduct of the unfaithful trustee, and become liable for his acts, by claiming property which has been purchased with trust funds; and the circuit court erred in condemning the plaintiff in error for so doing.

3d. The unqualified averment of the petition that the Live Oak Plantation was purchased by Fisk, who gave his own notes for part of the price, excludes any liability on the part of Cragin.

4th. It was error to condemn Cragin on the notes made by Fisk, even if the latter was agent of the former at the time.

5th. The act of sale from Quitman to Fisk was executed in solemn form before a notary, and is of the same character as a sealed instrument at common law. It was error to hold Cragin bound by its covenants, to which he was a stranger.

6th. It appears as a conclusion of law from the averments of the petition, that the defendant in error had, by prosecuting her claim to judgment against Fisk, elected to hold him as principal for

her debt; and it was therefore error to condemn Cragin.

7th. The second count of the petition for $10,000 damages does not aver any fact constituting an injury in law to the defendant in error, and it vitiates the judgment which was rendered on both counts.

8th. It is nowhere averred in the petition that Cragin ever promised to pay the debt of Fisk; or did any act which would charge him in law with the payment thereof; or that there was any sum of money due the petitioner.

ARGUMENT.

I.

The petition upon which judgment was rendered avers that "George D. Cragin is indebted unto the petitioner in the sum of $12,000 and interest for this," etc.

This general averment of indebtedness being merely the opinion of the pleader that the debt is due, we must look to the allegation of particular facts which follow it to ascertain whether the defendant is liable to pay the alleged debt.

The first fact averred for that purpose is, that Eliza A. Quitman sold the Live Oak Plantation to Orlando P. Fisk, who gave his notes for a portion of the price, but it does not appear to whom these notes were delivered. The petitioner then states that she became owner of the notes, BECAUSE she was

put in possession of the estate of her deceased sister, Louisa, as sole heir. Concede that the petitioner was heir of her sister, Louisa, it does not follow that she thereby became owner of the notes and right of action sued on. The title stated is fatally defective in this particular, and not merely defectively stated.

The next group of facts set out is that Cragin was the real owner of the plantation, *because* in a certain proceeding in the circuit court (the nature of which is not given), he CLAIMED the entire ownership of said plantation, and CLAIMED that the purchase was made in the name of said Fisk, who was acting as the agent of said Cragin, and that he was liable and ready to pay for said property; that afterwards the said Cragin was adjudged by the said circuit court to be the owner of said property, and that the matters in said petition were found to be true and correct.

What was intended to be charged against Cragin by this crude language it is impossible to determine.

Concede that Cragin *claimed* in this undescribed proceeding all that is charged, it is at best but inferior evidence of the fact, perhaps intended to be alleged, that Fisk, an agent, illegally used the money of Cragin, his principal, in the purchase of said plantation by himself, and that Cragin recovered the plantation from him by the establishment of a resulting trust.

This is not, however, a material issue in pleading, for if found in favor of the petitioner as alleged, it does not lead to a conclusion of law establishing a cause of action.

The notes given by Fisk for a part of the purchase price were secured by mortgage on the property, and Cragin recovered the property charged with debt; but he did not personally assume the payment of the debt, nor does the law, in the absence of an express agreement to pay, impose that obligation upon him. But we shall consider this point more at length in another part of our brief.

The next facts alleged in the second count are that Cragin, first as receiver and subsequently as owner of said plantation, removed all the movables existing on the same at the date of the sale to Fisk, of the value of $10,000, and committed waste. These facts, if true, do not create a legal cause of action against him. For, since it is not averred that the person suing had a mortgage upon or some other interest in the movables, it could be no offence for Cragin, either as receiver or owner, to remove them. But the petition wholly omits to charge that any sum of money was due the petitioner upon the obligation attempted to be set out. Concede that Fisk made the notes described in the petition; that Cragin subsequently claimed and recovered the plantation as owner, and carried off the movables as charged; that he paid the two first notes due, but

no more; that the plantation was seized under the mortgage, sold and bought in by Eliza Quitman for the sum of $10,400: it does not follow that Cragin became thereby indebted to the petitioner, or that a sum of money was due her from anybody whatever.

It is elementary that in all actions on contract, express or implied the declaration must allege a *promise*. It is not sufficient to allege or set out the evidence from which a promise may be presumed. Gould's Pleading, page 58, section 19.

And the general rule is that a judgment upon a declaration which does not aver a promise will be set aside even after verdict on issue joined: Meyers vs. Davis, 6 Blatchford 77.

Candler vs. Rossiter, 10 Wendell 488.

And the law will not create a promise in pleading. Ninan vs. Bland, 3 Smith, page 114.

Morris vs. Norfold, 1 Taunton, page 217.

Buckner vs. Angel, 1 Lev., page 164.

Nor does the Louisiana Code of Practice dispense with this necessary averment in pleadings.

II.

But if we give the petition the full weight claimed for it in argument, it presents the question whether the establishment of a resulting trust in favor of a principal, upon real estate purchased by an agent with the funds of the principal, renders the principal liable for the unpaid notes given by the agent for part of the price? Concede this to be the

real case, though it is not clearly made in the petition, it would seem that plaintiff in error cannot be held liable.

Cragin, no doubt, took the plantation subject to the mortgage, but no personal liability for the debt attached to him, even conceding that Fisk was his agent at the time of purchase.

It will be noted, however, that the petitioner does not aver that he was agent to purchase this particular plantation, or indeed any plantation. We may well concede that he was a general agent in charge of the funds of his principal, as in truth he was, and that he fraudulently invested part of these funds in the Live Oak Plantation and took title to himself.

But concede that Fisk was an agent to buy this particular plantation, he acted fraudulently outside of his agency and in his own name.

The general rule governing the liability of an unnamed principal for the contracts of his agent, even where the agent acts in his own name, *with the consent and knowledge of the principal*, was stated by this court in Nash vs. Towne, 5 Wallace, page 689, as follows: "Where a simple contract, *other than a bill or note*, is made by an agent, the principal whom he represents may in general maintain an action upon it in his own name."

The unnamed principal may also be sued on the contract of his agent, but there are many exceptions

to this rule arising from the form of the agreement.

Thus, where a contract is made under seal between an agent, in his own name, and a third party, the principal cannot sue or be sued thereon, though it may have been authorized. Story's Agency, section 461.

It has been decided in Louisiana that bills drawn by an agent, unless signed with the name of the principal, do not bind the latter. Daniels vs. Burnham, 2 L. 243.

Nugent vs. Hickey, 2 A. 358.

But the action has not been brought upon the notes, for they have been merged in the judgment rendered against Fisk in the foreclosure proceedings.

It is in fact brought upon a contract for the sale of real estate, against a person not a party to the instrument, to enforce a covenant for the payment of the price.

This contract, having been made before a notary, is called an authentic act in Louisiana, and is declared to be full proof of what it contains, against the contracting parties, unless it be proved a forgery. Civil Code, articles 2234–6.

Article 2276 of the Civil Code declares that evidence shall not be admitted against or beyond what it contains. A notarial act, made according to the law of Louisiana, imports absolute verity, and is of the same dignity as a bond under seal at the common law. Succession of Tate, 7 A. 95.

It is a well settled principle of law that those persons only can sue or be sued on sealed instruments who are named as parties to them, and that an action will not lie against one person upon a covenant which purports to have been made by another.

Beckham vs. Drake, 9 M. & W. 79.

Spencer vs. Field, 10 Wendell 88.

Townsend vs. Hubbard, 4 Hill 351.

In the case last cited it was held that where an agent, duly authorized to enter into a contract for the sale of the land of his principal, had entered into a contract in his own name, intending to execute the authority conferred upon him, the principal could not treat the covenants made by the agent as his, though it clearly appeared from the body of the contract that the stipulations were intended to be between the principal and the purchaser, and not between the vendee and the agent. The plaintiff in that case was owner of the land embraced in the contract, and brought his action to enforce the covenant of the vendees to pay the purchase money, but the court held that the suit could not be maintained, because plaintiff could not pass by the person named in the contract, and hold a third person on a covenant he had not made.

The general rule, as applied to deeds, is that they must be executed in the name of the principal to bind him.

"It is not enough," says Mr. Justice Shaw, in

Farwell vs. Schearer, 7 Mass. 14, "for the agent to even declare that he conveys for the principal."

To the same effect is Elwell vs. Shaw, 16 Mass. 42.

So, where an agent had authority from the corporation to make a deed, but signed as treasurer, it was held not to be the deed of the corporation. Brinsley vs. Munn, 2 Cush. 337.

And a charter party, though it purport to be made on behalf of all the owners, binds only those who have signed it. Kimball vs. Tucker, 10 Mass. 192.

Says Mr. Justice Parker, in Stackpole vs. Arnold, 11 Mass. 27: "No person, in making a contract, is considered to be the agent of another, unless he stipulates for his principal by name, stating his agency in the instrument he signs."

This was an action on a note made by an agent in his own name against the alleged principal, and the learned judge remarked, in the course of his opinion, that the rule of excluding testimony tending to vary written agreements has been applied generally, if not universally, to simple contracts in writing, to the same extent as to specialties or contracts under seal. Some authorities give a different reason for the rule, holding that persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them.

But a better reason would seem to be that a stranger to a contract cannot maintain an action on it, or be sued upon it, save in cases of commercial transactions, where, by well established usage, contracts are often made by brokers and agents, ostensibly in their own names, but in fact for principals whom they have a right to name.

In New York and Massachusetts the rule is so strictly enforced that a maker of a note who describes himself as agent of a particular person is held to bind himself and not the principal. Delbitt and Talbott vs. Walton, 9 N. Y. 571.

Baker vs. Ins. Co., 3 Wendell 94.

Peutz vs. Stanton 10 Wendell 271.

Eastern R. R. Co. vs. Benedict 5 Gray 566.

Tabor vs. Cannon, 8 Metcalf 456.

Brown vs. Backer, 7 Allen 337.

Bradwell vs. Boston Glass Co., 16 Pick. 347.

Bass vs. O'Brien, 12 Gray 447.

This strict rule has been modified somewhat in favor of bills and notes, when issued in the course of commercial transactions ; and it is now held by some of the courts, that if it can be gathered from the whole instrument that its true intent was to bind the principal and not the agent, the courts will adopt that construction of it.

But the rule is limited to cases where the instrument purports in some manner to have been exe-

cuted by an agent on account of the principal. Metcalf vs. Williams, 104 U. S. 93.

1 Daniel on Negotiable Inst., sec. 303.

With this limitation the rule is almost universal.

Tyler vs. Steel, 26 Alabama 487.

Merchants' Bank vs. Central Bank, 1 Ga. 418.

McDonald vs. Bear River Co., 13 Cal. 220.

Garrison vs. Combs, 7 J. J. Marshal 84.

In these cases the agent had express authority to execute the notes and contracts sued on; but not having acted in the name of the principal the latter was held not to be bound.

In Louisiana nothing short of a written admission or counter letter between the parties who executed the contract will permit either of them to vary its terms, save in cases where fraud or error is alleged and proved. Maignan vs. Glaisses, 4 L., p. 1.

Dabadie vs. Poydras, 3 A. 154.

But neither fraud nor error is set up in this case as ground for going behind the contract.

But we contend that the case at bar is outside of all questions of agency, so far as third persons are concerned. It is not alleged that Fisk was the agent of Cragin to buy this plantation. The substance of the averment is that he was the general agent of the latter, and wrongfully invested the money of his principal in a plantation, and that the principal claimed and obtained possession of the property so purchased by right of a resulting trust.

The petition shows, if it shows anything, that Cragin acquired the property subject to the mortgage placed upon it by Fisk; but it does not aver that Cragin even promised or obligated himself to pay the mortgage debt. On the contrary, it is averred without qualification that Fisk made the purchase for himself, and in his own name, and that the liability for the unpaid price was enforced against him.

The particular evidence set out tends only to prove the resulting trust established upon the plantation in Cragin's favor, by his proceeding against Fisk, and in no sense proves a promise, unless a promise results from the enforcement of the trust.

In cases of this sort, says Judge Story, the beneficiary is not at all bound by the act of the trustee. 1 Story's Eq. Jur., secs. 1260–2.

We have been unable to find a single case in the books which holds that the beneficiary in a resulting trust incurs any personal liability to discharge the mortgages placed upon the property by the trustee in a case like this.

The doctrine of resulting trusts in this class of cases, says Mr. Justice Story, is not based upon any notion that the *cestui que trust* has ratified the act of the trustee, but upon the mere ground of the wrongful conversion, creating, *in foro conscientiæ*, a trust in his favor. 2 Story's Eq Jur., sec. 1260.

The law gives him the choice to demand repay-

ment of the trust fund or to claim the property into which it has been converted. If he takes the substitute for the fund, he takes it subject to all mortgages placed upon it in favor of innocent third persons, but incurs no personal liability to discharge the mortgage debts of the trustee. If by claiming the property he must ratify the acts of the trustee, he would deprive himself of all relief by approving the conversion.

To be bound personally for the debts secured upon the property by the trustee, it would seem clear that the beneficiary must expressly assume them in writing by some stipulation in favor of the creditors, otherwise he will incur no liability, either at the common law or under the civil law, as it prevails in Louisiana. Belmont vs. Coneau, 22 N. Y. 438.

Trotter vs. Hughes, 12 N. Y. 74.

Balfour vs. Chew, 4 Martin, N. S. (La.), 154.

McAuley vs. Hagan, 6 Robinson (La.) 359.

Defendant in error has not only recovered back the property sold to Fisk, but has received $10,500 of the money of the plaintiff, so that equity and good conscience do not require the law to impose any further charge upon him by implication. By whatever title he acquired the mortgaged property, he is to be held liable for this debt only through some express promise, as any other person would be who had received the conveyance. But none is averred. The burden of the complaint is, that he

became liable because he established a trust upon the property by a suit against Fisk.

The right of a third person to sue on a stipulation in his favor, contained in a contract between other parties, is granted by article 1890 of the Civil Code of Louisiana, but the stipulation is never implied. It must, as at the common law, be express.

As between the parties to a contract, the law often implies a promise by the one or the other to do such acts as equity and good conscience require in the execution of express stipulations; but nothing is implied in favor of a stranger to their agreement.

The whole question presented in this part of our brief, both as to the liability of an undisclosed principal for the contracts of an agent, and the liabitity of a beneficiary in a resulting trust, has recently been examined by the court of appeals in Tuthill vs. Wilson, 90 N. Y. 423. That case is almost the counterpart of the one at bar.

The facts in that case show that Ira H. Tuthill made a contract with one Wm. McNish, by which he agreed to sell to the latter Robins Island, and to execute to him a warrantee deed upon the payment of $20,000. McNish, two days afterwards, transferred his interest to Geo. E. Horne. Later the contract was executed in a modified form. Tuthill executed a deed to Horne for the expressed consideration of $20,000—$5000 of which was paid in cash, and the balance was discharged by the pur-

chaser giving his bond, secured by mortgage on the property, for $9800, and the assumption of an outstanding mortgage in favor of other parties for $5200. Horne then conveyed the property to Elizabeth M. Moffitt, who assumed all three mortgages. Soon afterwards Tuthill foreclosed the Horne mortgage by suit. He became the purchaser of the property at the sale for $8000, and obtained a judgment against Mrs. Moffitt for the deficit. Execution was issued against her, and returned unsatisfied. Whereupon, he brought suit against James Wilson, on the alleged ground that throughout all these transactions the vendees and assignees were but the agents of Wilson, the real but undisclosed principal. But the court held—

1st. That even if it be admitted that Horne acquired the title as trustee of Wilson, the latter could not be held liable upon the covenants of the former, nor could he be held liable on the assumpsit of Mrs. Moffitt, even conceding that she was his agent, because Wilson was a stranger to the contract of sale, and could not sue or be sued upon it.

2d. That if Wilson was ever liable as principal, he could not be proceeded against, because Tuthill had elected to hold the agent liable as principal.

III.

A vendor who sells property by simple contract in a commercial transaction, to a person who is acting as the agent of an undisclosed princi-

pal, has an election whether he will hold the agent or the principal when discovered. He cannot hold both as principals.

The rule was clearly stated by Lord Tenterden in the leading case of Thompson vs. Davenport, 9 Barn. & Cress. 78, and has been universally followed in England and this country ever since.

It was said in Priestly vs. Feriere, 3 H. & C. Exch. 982, that "where the agent, having made a contract in his own name, has been sued to judgment, there can be no doubt that no second action would be maintained against the principal."

Where it appears that a third person has sued the agent to judgment, it is a conclusion of law that he has made his election. Calder vs. Dobell, L. R. 6; C. P. 486.

"An election once made becomes irrevocable," says Story on Agency, section 447.

The rule laid down in Thompson vs. Davenport has been cited with approval by this court in Nash vs. Towne, 5 Wallace 753, and it has been followed by the Supreme Court of Louisiana in Hyde vs. Wolf, 4 La. 234.

In the absence of an averment that the vendor only discovered that Cragin was principal after she had proceeded against Fisk, we must presume that she knew the fact from the first.

The simple and unqualified averment that the creditor has recovered and executed a judgment

against the agent, precludes the action against the principal, unless the effect of the election is avoided in some manner.

It is a principle of pleading that the admission of a fact which operates as a bar to an action will defeat the action, unless the bar is destroyed by pleading matter in avoidance. In this case the petition admits a fact which, in law, bars the suit, but nothing whatever is set up in avoidance. In effect the petitioner says: "I have exhausted my remedy against the agent, and therefore I am entitled to go against the alleged principal" But the conclusions of the law upon the facts stated are against her.

IV.

The charge laid in the second count of the petition, that Cragin as receiver, and subsequently as owner, carried off movables which existed on the plantation *at the date of the sale to Fisk*, of the value of $10,000, and committed waste, is clearly bad.

Without an averment that the petitioner had some interest in these movables, she had no right of action against Cragin therefor, even if she was injured thereby. The act was *damnum absque injuria*. Designating the act as waste adds nothing to the effect of the charge of removing the property.

The verdict in this case was general on both counts, and the judgment must be set aside, as the

last count is clearly bad. Gould's Pleading, section 58, page 523.

Kingsley vs. Bill, 9 Mass., page 198.

Stevenson vs. Hayden, 2 Mass., page 406.

Such a verdict will be sustained only where the record shows, by a certificate of the judge, that, though general, it was rendered on evidence offered on the good count only. Sullivan vs. Holker, 15 Mass., page 374.

The petition is clearly bad for another reason : It unites a count in tort with one on contract. This defect is not cured by verdict. Garland vs. Davis, 4 H. 131.

V.

The errors are all matters of substance, apparent on the face of the record, which might have been taken advantage of by general demurrer, or motion in arrest of judgment, in the circuit court, and they, therefore, may be reviewed here. Gould's Pleading, page 492.

McAllister vs. Kuhn, 96 U. S., page 78.

An essential fact, not averred, cannot be proved, nor will it be presumed to have been proved. Bank vs. Smith, 11 Wh. 171.

Says Lord Mansfield, in Rushton vs. Aspinwal Douglas, R. 683, " no proof at the trial can make good a declaration which contains no ground of action on the face of it." And this is so, says this learned judge, even if it may be presumed that an

essential fact, not averred, was proved. See, also, Spier vs. Parker, 1 Durnford & East. 141.

It is sometimes difficult to determine when an action is defective in substance or merely defectively stated.

It has been held, however, that in a suit against an endorser, the omission to aver notice of the dishonor of the note is fatal to the declaration. Slocum vs. Powery, 1 Cranch, p. 221.

So where the place of payment of a note sued on was not averred, the declaration was held to be bad. Covington vs. Comstock, 14 Peters 43.

In Louisiana the rule is equally strict as at common law, for a judgment by default against the endorser of a note will be set aside on appeal, for error on the face of the record, if the petition does not aver notice. La. State Bank vs. Senecal, 9 L. 225.

An example of a case in which a title defectively stated will be aided by verdict is found in Brent vs. The Bank, 1 Peters 89. The averment of the declaration in that case was that "the defendant, by A. B., his agent," made the note sued on. It was argued that it should have been averred that the note was made by A. B., his *duly authorized* agent. But the court held that in proving the agency the plaintiff must necessarily have proved his authority, and that the defect was cured by the verdict.

From this we deduce the rule to be, that where the principal fact upon which a recovery is sought has been alleged, and the fact could not have been

proved without at the same time proving minor facts not alleged, but necessary to the recovery, the declaration will be aided by verdict.

The substance of the first count of the petition upon which judgment was rendered, is that the plaintiff in error became liable to the defendant, because he claimed and recovered property purchased by Fisk with his money.

Whether such a transaction created the relation of principal and agent between Cragin and Fisk is not material. As beneficiary in the resulting trust, we find no principle of law which imposes a personal liability upon him for the debt of the trustee. If he was in fact the undisclosed principal, he cannot be sued on a promissory note made by the agent in his own name, nor upon the personal covenant of the agent contained in the act of sale, which is of the same solemen character as a sealed instrument. And, moreover, if Cragin was ever liable as principal, it appears, as a conclusion of law, from the allegations of the petition, that the creditor has elected to hold the agent liable as his debtor, and thus waived his action against the principal.

But the second count for damages is so clearly bad on bare inspection, that the judgment must be reversed, if upon no other ground.

Respectfully submitted.

J. D. ROUSE,
WM. GRANT,
Attorneys for Plaintiff in Error.

Supreme Court of the United States.

October Term, 1883.

No. 92.

GEORGE D. CRAGIN, PLAINTIFF IN ERROR,

v.

WILLIAM S. LOVELL, EXECUTOR OF ELIZA A. QUITMAN, DECEASED.

Brief for Defendant in Error.

STATEMENT OF THE CASE.

We are obliged to call the attention of the court to a few errors in the statement of the case as made in the brief for plaintiff in error, which though perhaps at first sight trivial, we believe to be of importance to the decision of the cause.

1st. It is stated that our petition alleges that we "fore-"closed our mortgage by suit *against Fisk*," whereas the allegation is "that your petitioner was compelled to fore-"close her mortgage *against the said property*, and to buy "in the same, which was done *after due and legal proceed-"ings*."

See foot of page 1 and top of page 2.

The difference between a "suit against Fisk" and "legal "proceedings against the property," under Louisiana law,

are very different. A suit involves a summons, a defence, a day in court, and all that these things imply, while legal proceedings for the foreclosure of a mortgage are against the property itself, without even the formalities of an ordinary action *in rem*, by virtue of a writ of seizure and sale, by which the property is sold without even the appearance of a defendant.

Code of Practice of Louisiana, arts. 63, 734.

And this proceeding is in no manner a suit against any defendant, and can result in no moneyed judgment against any defendant, but simply is an order to the sheriff to seize and sell the property and apply the proceeds to the payment of the debt for which the property has been hypothecated. Consequently the notes that we have sued on were never merged in any judgment against any one by our "legal pro- "ceedings against the property," as is argued by counsel on the other side.

2d. In the statement of facts of the plaintiff in error it is omitted to state that it is alleged in our petition that Cragin in his bill in equity against Fisk, after alleging that the plantation had been purchased with his funds, and that he had paid the first and second note given for the purchase price, goes on further to declare that he, said Cragin, "*was* "*liable for and ready to pay for said property.*" (See petition, page 2, line 19.)

3d. In the statement of facts of the plaintiff in error it is omitted to state that the petitioner was put into possession of the estate of her deceased sister "under her last will and "testament, duly recognized as her sole and only heir and "legatee," and that deceased was the "co-vendor" of petitioner. (Foot of p. 2.)

With these corrections in the statement of the case, much, if not all, of the argument of the counsel on the other side disappears.

I.

We set forth a clear legal cause of action in our petition; it is a suit upon notes of hand, which we allege to be the "promises to pay" of the plaintiff in error, although they are signed by another man; we allege that the consideration for which they were given inured directly to Cragin, and that he entered into possession of it and enjoyed it as owner immediately upon the making of the notes, and that he afterwards, in a deliberate legal proceeding instituted by himself, set forth these facts and acknowledged his liability upon these notes as maker thereof by his own solemn allegations, verified by the oath that he was bound to annex to his bill in equity.

But he did even more than all this, according to the averments of our petition; he entered into a *stipulation pour autrui*, into a contract in our favor by which he bound himself to pay our notes, for he alleged himself in his bill in equity against Fisk to be *liable for and ready to pay for said property*, and he could not have maintained that bill in equity against Fisk without having made such an allegation, and under the laws of Louisiana we, the third parties, have a right to avail ourselves of such stipulation and to enforce its execution.

Civil Code of Louisiana:

"ART. 1890. A person may also, in his own name, make "some advantage for a third person the condition or consid- "eration of a commutative contract or onerous donation; "and if such third person consents to avail himself of the

" advantage stipulated in his favor the contract cannot be " revoked."

Bank *vs.* Burke, 4 Rob., (La.,) 441.
Myers *vs.* Perry, 1 La. Ann., 372.
Bank *vs.* Lawless, 3 La. Ann., 129.
Bonnafe *vs.* Lane, 5 La. Ann., 225.

And in the case of Hendrick *vs.* Lindsay, (93 U. S. Rep., 143,) this court held: " It is now the prevailing rule in this " country that a party may maintain assumpsit on a promise " not under seal made to another for his benefit."

In Brewer *vs.* Dyer (7 Cushing, 337) the defendant made a written promise to the lessee of a shop to take his lease (which was under seal) and pay the rent to the lessor according to its terms, entered into the possession of the shop with the lessor's knowledge, paid him the rent quarterly for a year, and then, before the expiration of the lease, left the shop, and was held liable to an action by the lessor for the rent subsequently accruing, and this was distinctly approved in Exchange Bank *vs.* Rice, (107 Mass., 42.)

That case runs on all fours with the one at bar. Here the real owner ousts his agent from the property by legal process, averring his liability and readiness to pay for the property *as purchaser*, the purchase price thereof represented by his agent's notes, continues to pay said notes for three years and then fails to pay any more; certainly he must be liable for the other notes " subsequently accruing."

II.

The whole reasoning of the argument in support of the second assignment of error is at fault from the misstatements of fact that our action was not brought upon the notes given for the purchase price of the property, and that they had been merged in the judgment rendered against Fisk in the

foreclosure proceedings. The contrary is the fact; the suit is brought upon the notes as is shown by the prayer of our petition, (foot of p. 2,) and we have already shown that there there was no *judgment* against Fisk in the foreclosure proceedings.

III.

It not being a fact that we have proceeded to recover and execute a judgment against Fisk, the agent, we cannot be precluded, as is contended, from bringing our action against the principal, Cragin. We do not allege that we have brought any action against the agent; on the contrary, we allege that we have proceeded against the property, as we were bound to do, and have exhausted that. We show that we elected to hold Cragin, by acknowledging him as our debtor, for three years receiving from him payment of the debt as the several instalments fell due, and have never proceeded against Fisk, the agent.

IV.

There was no error to condemn Cragin on the notes sued upon, for by his own act he had assumed them, stipulated to pay them, *paid* some of them, and thus had made them his own notes.

V.

In the same manner Cragin had substituted himself as the purchaser of the plantation in the place of his agent, Fisk, and we had accepted that substitution, and Cragin cannot consistently say that he was a stranger to the act of sale.

VI.

We have already answered that we have not averred that

we had prosecuted our claim to judgment against Fisk. Therefore we had not elected to hold him as principal for the debt.

VII.

The allegation in our petition that Cragin carried off movables from the plantation which existed at the time of sale, of the value of $10,000, and committed waste, is not made as attempting to show that therefore Cragin was indebted to us, but merely to show further his assumption of the debt, and his ratification by his acts of the purchase of the plantation for him by his agent, and for that "liable and "indebted unto your petitioner in the full amount of said "*notes*." (Page 2, lines 34 and 35.)

VIII.

It is not only averred in our petition that Cragin did assume to pay the notes sued upon, but that, in pursuance of that assumption, he did pay some of them, (bottom of p. 1;) that he made the notes his own, and was therefore charged in law with the payment thereof, and that he was "liable and indebted unto your petitioner in the full amount "of said notes."

We pray that the judgment may be affirmed.

Respectfully submitted.

JOSEPH P. HORNOR,
WILLIAM S. BENEDICT,
of Counsel.

WASHINGTON, D. C., 23*d October*, 1883.

109-194

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 93.

GEORGE D. CRAGIN, APPELLANT,

vs.

WILLIAM S. LOVELL, EXECUTOR OF ELIZA A. QUITMAN, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED OCTOBER 11, 1880.